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FILED
DEC 13 1993
OFFICE OF THE CLERK

No. 93-380

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN ERIC PRICE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE IMMIGRATION AND NATURALIZATION SERVICE IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to become a naturalized citizen of the United States despite his refusal to provide, as required by statute, "all facts which in the opinion of the Attorney General may be material to [his] naturalization." 8 U.S.C. 1445(a) (1988 & Supp. IV 1992).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B18) is reported at 962 F.2d 836. An earlier opinion (Pet. App. A1-A19), which was withdrawn, is reported at 941 F.2d 878. The opinion of the district court (Pet. App. D1-D24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 1992.[1] A petition for rehearing was denied on June 7, 1993. The petition for a writ of certiorari was filed on September 3, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of the United Kingdom. He was granted resident alien status in the United States in 1960 and has resided in the United States since then. On April 21, 1984, petitioner submitted an application for naturalization. He answered all questions on the application form except for Question 18, which required petitioner to list his "present and past membership in or affiliation with every organization, association, fund, foundation, party, club, society or similar group in the United States or in any other country or place, and [his] foreign military service." In response to Question 18, petitioner attached a legal brief contending that the question violated his right of association under the First Amendment. Pet. App. B4.

Petitioner did answer Question 19, denying that he was or ever had been a member of or associated with the Communist Party, had ever knowingly aided or supported it, or had ever "advocated, taught, believed in, or knowingly supported or furthered the interests of Communism." Pet. App. B4. During an examination by a designated naturalization examiner, petitioner also swore (*ibid.*):

[1] The original opinion of the court of appeals was filed on August 7, 1991. That opinion was withdrawn, and the final opinion and order were issued on April 20, 1992.

> I am not and have not been, within the meaning of the Immigration and Nationality Act, for a period of at least 10 years immediately preceding the date of this petition, a member of or affiliated with any organization proscribed by such Act, or any section, subsidiary, branch, affiliate or subdivision thereof, nor have I during such period believed in, advocated, engaged in, or performed any of the acts or activities prohibited by such Act.

At a further preliminary examination, petitioner reaffirmed under oath both his negative answer to Question 19 and that he was not, and never had been, a member of or affiliated with any organization covered by 8 U.S.C. 1424(a) (1988), which described various types of organizations and activities participation in which would bar an alien from being naturalized.[2] Pet. App. B4, B5-B7. When asked about Question 18, petitioner denied any foreign military service and admitted that he had been a member of "any organization," but refused to answer any further questions on that subject on the ground that they were "overbroad" and violated his constitutional rights. Pet. App. B4-B5.

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[2] Petitioner's response was based on Section 1424(a) as in effect at the time of his application and examination. That version is reprinted in pertinent part at Pet. App. B6 n.2. A statutory amendment enacted in 1991 deleted separate prohibitions on affiliations with "Communist-action" and "Communist-front" organizations, see 8 U.S.C. 1424(a)(2)(G)-(H) (1988), but retained an exception for any applicant who can "establis[h] that he did not have knowledge or reason to believe at the time he became a member of or affiliated with such an organization * * * that such organization was a Communist-front organization." 8 U.S.C. 1424(a)(2) (1988 & Supp. IV 1992). The current version of the statute is reprinted at Pet. App. E1-E4.

2. The INS's Designated District Examiner recommended against petitioner's naturalization because petitioner, by refusing to answer Question 18, had failed to prove his eligibility. Pet. App. D4. The district court denied the application for naturalization on the same ground. *Id.* at D1-D24. The court held that petitioner's failure to answer questions regarding his affiliations provided a "facially legitimate and bona fide reason" for denial of his application for naturalization. *Id.* at D23 (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972)). In the alternative, the court held that "even under a balancing test, the government has a compelling interest in mandating a response to Question 18 as a precondition to naturalization which outweighs any First Amendment right of association of the petitioner to refuse to answer the question." Pet. App. D22.

3. The court of appeals affirmed. Pet. App. B1-B18. The court first concluded that the decision to ask Question 18 was well within the "broad authority given the Attorney General to implement the naturalization statutes," because it is "reasonable to assume that knowing the organizations with which [an applicant] is associated will be relevant to one or more of the requirements for citizenship" that Congress has prescribed. *Id.* at B10. Those requirements include, among others, that the applicant be of "good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States," 8 U.S.C. 1427(a)(3) (1988 & Supp. IV 1992), and that he or she not be affiliated with any organization of the types proscribed by 8 U.S.C. 1424.

The court further held that Question 18 was consistent with the First Amendment. It began by noting (Pet. App. B11) that this Court "has historically afforded Congress great deference in the area of immigration and

naturalization," and indeed that "[o]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Ibid.* (quoting *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977)). Moreover, while acknowledging that petitioner, as a lawful resident alien, was entitled to "the greatest degree of constitutional protection afforded a non-citizen" (Pet. App. B13), the court pointed out that he could not be entitled to greater rights than those who were already citizens. The court therefore applied in this case the standard of constitutional review articulated by this Court in cases involving the rights of citizens: that decisions in the area of immigration and naturalization are valid so long as they are made "on the basis of a facially legitimate and bona fide reason." *Id.* at B12 (quoting *Kleindienst* v. *Mandel*, 408 U.S at 770); see also *Fiallo* v. *Bell*, 430 U.S. at 794-795.

The court of appeals rejected (Pet. App. B13) petitioner's contention that requirements for naturalization differ, in this regard, from requirements regarding eligibility for initial or temporary admission into the United States; it remarked that the determination of who will become a citizen is "at least as 'peculiarly concerned with the political conduct of government,' *Galvan* v. *Press*, 347 U.S. 522, 531 (1954), as the decision of who will be allowed to enter, if not more so," because a naturalized citizen is allowed to "participate in the process of governing the country." *Ibid.* The court also concluded (*id.* at B14) that it was appropriate to apply to the Attorney General's implementation of Congress's substantive decisions with respect to eligibility for naturalization the same constitutional standard that is applied to decisions concerning the admission of aliens. And because of the sensitive nature of immigration and naturalization decisions, the court explained that "the reasons for giv-

ing deference to agency decisions . . . in other administrative contexts apply with even greater force in the INS context." *Id.* at B10 (quoting *INS* v. *Abudu*, 485 U.S. 94, 110 (1988)).

Applying these principles, the court reasoned (Pet. App. B9) that to omit Question 18 and to limit investigation in the ways suggested by petitioner would

> requir[e] the INS to rely on [applicants'] own determinations [about] whether particular organizations are of the prohibited type, rather than allowing the Service to make that determination, and [would] not address the possibility that [an applicant] may wrongly believe that an organization with which he is affiliated does not fall within section 1424(a).

In addition, the court determined that Question 18 "could reasonably reveal information relevant to other requirements for naturalization." *Id.* at B16; see *id.* at B10. Thus, the court concluded that the Attorney General had "facially legitimate and bona fide" reasons for relying upon Question 18 to help determine whether petitioner was eligible for naturalization. *Id.* at B16.

Judge Noonan dissented (Pet. App. B16-B18), contending that the First Amendment requires the government to ask applicants for naturalization more narrowly tailored questions, focusing on whether they belong to foreign military or intelligence organizations or groups committed to subversion or terror. *Id.* at B18.

ARGUMENT

The Constitution confers upon Congress the power "[t]o establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4. Moreover, as the court of appeals pointed out (Pet. App. B11), this Court "has historically afforded Congress great deference in the area of immi-

gration and naturalization"; indeed, "over no conceivable subject is the legislative power of Congress more complete." *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339 (1909)).

Under the naturalization statutes now in effect, an applicant for naturalization must be a lawfully admitted permanent resident alien (8 U.S.C. 1429 (1988 & Supp. IV 1992)), must have resided in the United States for at least five years prior to the filing of the naturalization application (and during the time subsequent to filing the petition and prior to admission to citizenship), and must have been physically present in the country for at least half of that time (8 U.S.C. 1427(a)(1) and (2) (1988 & Supp. IV 1992)). In addition, during the same period, the applicant must be a "person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States." 8 U.S.C. 1427(a)(3) (1988 & Supp. IV 1992). Finally, the applicant must not have engaged in activities or been affiliated with organizations of the types specified by Congress in 8 U.S.C. 1424(a) (1988 & Supp. IV 1992) (including anarchist, Communist, totalitarian, and politically violent or destructive groups; see Pet. App. B6 n.2 (reproducing portions of 8 U.S.C. 1424(a) (1988)).

Congress has given the Attorney General broad discretion to "prescribe the scope and nature of the examination of applicants for naturalization," in order to determine whether they meet the statutory criteria for admission to citizenship. 8 U.S.C. 1443(a) (1988 & Supp. IV 1992). Specifically, the Attorney General has authority to require from an applicant "averments of all facts which in the opinion of the Attorney General may be material to the applicant's naturalization, and required to

be proved under [the relevant statutory provisions]" (8 U.S.C. 1445(a) (1988 & Supp. IV 1992)), and to authorize INS employees "to take testimony concerning any matter touching or in any way affecting the admissibility of any applicant for naturalization." 8 U.S.C. 1446(b) (1988 & Supp. IV 1992).[3]

In carrying out these statutory responsibilities, the Attorney General has since 1949 asked all applicants for naturalization—including more than 7.2 million now-naturalized citizens—some version of the question regarding past and present organizational affiliations that petitioner refused to answer. See Pet. App. D4 & n.2. The court of appeals correctly concluded that the Attorney General may require petitioner to respond to that question before approving his application for citizenship. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals, and it does not warrant further review.

1. Petitioner first contends (Pet. 9-11) that Question 18 exceeds the bounds of inquiry permitted to the Attorney General by the naturalization statutes. This Court has previously made clear, however, that "[t]he Government is entitled to know of any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts are raised." *Berenyi* v. *District Director*, 385 U.S. 630, 638 (1967). As the courts below concluded (Pet.

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[3] See also 8 U.S.C. 1443(a) (1988 & Supp. IV 1992) (examination prescribed by the Attorney General "shall be limited to inquiry concerning the applicant's residence, physical presence in the United States, good moral character, understanding of and attachment to the fundamental principles of the Constitution of the United States, ability to read, write, and speak English, and other qualifications to become a naturalized citizen as required by law, and shall be uniform throughout the United States.").

App. B9-B10, B16, D9-D12), Question 18 seeks information material to determining whether an applicant is qualified for naturalization. Under 8 U.S.C. 1424(a) (1988 & Supp. IV 1992), such information could include membership in anarchist, Communist or certain other organizations. Under 8 U.S.C. 1427(a)(3) (1988 & Supp. IV 1992), it could include information about associations indicative of whether the applicant is a person of "good moral character" and is "well disposed to the good order and happiness of the United States." The answer might, for example, reveal that the applicant was a member of a terrorist group, a drug-smuggling enterprise (see *United States* v. *Abdulghani*, 671 F. Supp. 754 (N.D. Ga. 1987)), or a Nazi hate group (see *United States* v. *Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982)). Finally, disclosure of an applicant's memberships in organizations might help the Attorney General determine whether the applicant has been a bona fide resident of the United States for the period required by statute. 8 U.S.C. 1427(a)(1) and (2) (1988 & Supp. IV 1992).

Petitioner argues (Pet. 20-21) that the Attorney General could satisfy her statutory responsibilities by asking only specific, yes-or-no questions concerning petitioner's associations with particular types of proscribed groups. The court below correctly rejected that argument. Pet. App. B9-B10. Under the Act, it is the Attorney General and the district court—not petitioner—who bear ultimate responsibility for determining whether any group with which petitioner may have been associated comes within one of the statutory prohibitions, or raises questions concerning his moral character, his disposition toward the good order and happiness of the United States, or his satisfaction of pertinent residency requirements. Nothing in the Act or the Constitution requires the Attorney General to accept petitioner's own

judgment concerning the relevance of one or more of his associations to any of those questions.[4]

Petitioner cites *Girouard* v. *United States*, 328 U.S. 61 (1946), for the proposition that naturalization statutes, and the Attorney General's investigative authority thereunder, should be construed narrowly so as to avoid any question of a First Amendment violation.

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[4] As the court of appeals pointed out (Pet. App. B9-B10), this point is particularly clear in relation to associations that may be proscribed only if an applicant was or should have been aware of the true nature of their beliefs, goals or activities. The court discussed in particular 8 U.S.C. 1424(a)(2)(H) (1988), in effect at the time of petitioner's application, concerning association with "Communist-front organization[s]." Although subsection (H) was repealed in 1991 (see Immigration Technical Corrections Act of 1991, Pub. L. No. 102-232, Tit. III, § 309(b)(13), 105 Stat. 1759), the amendment did not affect the proviso, now applicable to any association otherwise proscribed under Section 1424, that the applicant may show "that he did not have knowledge or reason to believe * * * that such organization was a Communist-front organization." Similarly, 8 U.S.C. 1424(a)(3)-(6) describes prohibited associations or activities some of which include a specific knowledge requirement, and others of which might be carried on by an organization without the knowledge or active participation of all of its members or associates. As the court of appeals observed (Pet. App. B9 & n.3), this case does not present the question of what sort of knowledge or what degree of association might be required to deny naturalization to an applicant who could show ignorance of the proscribed beliefs or activities of a particular organization. The point remains, however, that such an applicant—or one who could plausibly claim such a lack of knowledge or involvement—would fail to answer "yes" to any question that merely catalogued specific proscribed activities. The Attorney General is not compelled to accept such an answer, whether innocent or dissembling; she is entitled to evaluate for herself, based on broader knowledge and experience than may be available to the individual applicant, the nature of the groups with which an applicant has been associated.

See Pet. 9-11. In *Girouard*, the Court refused to read a statute that required an applicant for naturalization to swear to "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic," to sanction the further requirement, imposed only by the application form, that the applicant swear to "take up arms in defense of this country." 328 U.S. at 62. But *Girouard* did not read a broad statute narrowly in order to avoid constitutional questions; if anything, the opinion suggests that there would have been no limit on Congress's authority to adopt a "bear arms" requirement had it chosen to do so. *Id.* at 69-70.

As the court of appeals recognized (Pet. App. B14-B16), *Girouard* turned on this Court's conclusion that Congress had not expressly imposed willingness to bear arms as a requirement for naturalization (see 328 U.S. at 64), and that there were cogent reasons—based not only on traditions of religious tolerance, but also on other uses of the same oath and on specific congressional actions permitting naturalization of other religious noncombatants—not to infer such a legislative intent. *Id.* at 65-70. Those conclusions have little bearing on this case, in which Congress has set particular requirements for naturalization and has broadly authorized the Attorney General, in conducting naturalization investigations, to require "averments of all facts which in [her] opinion * * * may be material to the applicant's naturalization," and to ask questions "concerning any matter touching or in any way affecting" the fulfillment of the statutory requirements. 8 U.S.C. 1445(a), 1446(b) (1988 & Supp. IV 1992). Where a statutory provision is plain and an administrative implementation well within its bounds, the courts should not adopt strained constructions under the guise of avoiding constitutional questions. See, *e.g.*, *Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373, 379 (1933).

2. Petitioner further contends (Pet. 11-21) that Question 18 violates his rights of free association under the First Amendment. The courts below also correctly rejected that contention.

"No alien has the slightest right to naturalization unless all statutory requirements are complied with." *Fedorenko* v. *United States*, 449 U.S. 490, 506 (1981) (internal quotation marks omitted); accord *Schneiderman* v. *United States*, 320 U.S. 118, 131 (1943); *Tutun* v. *United States*, 270 U.S. 568, 578 (1926); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 290 (1904). Moreover, "the burden is on the alien applicant to show his eligibility for citizenship in every respect." *INS* v. *Pangilinan*, 486 U.S. 875, 886 (1988) (quoting *Berenyi* v. *District Director*, 385 U.S. at 637); accord *Kimm* v. *Rosenberg*, 363 U.S. 405, 406 (1960) (per curiam).

Resident aliens are, of course, entitled to protection of their rights under the First Amendment. See, *e.g.*, *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 596 n.5 (1953) (quoting *Bridges* v. *Wixon*, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)). In the context of an application for naturalization, however, the scope of those rights may be limited by the government's compelling interest (and Congress's near-plenary constitutional power) in regulating immigration and the conferral of citizenship on those who have no direct constitutional entitlement thereto.[5] See *Reno* v. *Flores*, 113 S. Ct. 1439,

[5] Indeed, as the district court held (Pet. App. D20-D22), the government's interest is sufficiently compelling to sustain the Attorney General's decision to ask Question 18 in this case, even if that decision were properly subject to a heightened standard of review. The court of appeals did not address that question because it concluded, correctly, that the validity of Question 18 should be evaluated under the lesser standard discussed in the text.

1449 (1993) ("in the exercise of its broad power over immigration and naturalization, 'Congress regularly makes rules that would be unacceptable if applied to citizens' ") (quoting *Fiallo* v. *Bell*, 430 U.S. at 792, quoting *Mathews* v. *Diaz*, 426 U.S. 67, 80 (1976)).[6]

In any event, resident aliens are entitled to no greater constitutional protection than is afforded to citizens, and this Court has made clear that even as to the rights of citizens, the scope of judicial review of decisions in the sensitive area of immigration and naturalization is exceptionally narrow. In *Kleindienst* v. *Mandel*, for example, the Court considered a challenge to the Attorney General's decision to exclude from the United States, as permitted by statute, an alien academic who "advocate[d] the economic, governmental, and international doctrines of world communism." 408 U.S. at 756. Aside from Mandel himself, the plaintiffs were American scholars asserting a constitutional right, as citizens, to meet and confer with Mandel; the Court explicitly noted that no right was asserted on behalf of the alien himself. *Id.* at

[6] Petitioner contends (Pet. 19) that Question 18 violates his First Amendment rights because it would not be permissible for the government to ask a citizen to list all of his or her group associations in an application for continuing employment as a schoolteacher. See *Shelton* v. *Tucker*, 364 U.S. 479 (1960). The primary distinction between this case and *Shelton* is not one between citizens and resident aliens, but one between the unique context of immigration and naturalization decisions and the ordinary context of routine government employment decisions. Cf. *Ambach* v. *Norwick*, 441 U.S. 68 (1979) (State may exclude from public school teaching positions aliens who have declined to apply for naturalization). In this regard, resident aliens applying for naturalization are subjected not so much to "rules that would be unacceptable if applied to citizens" (*Mathews* v. *Diaz*, 426 U.S. at 80), but to rules that are relevant and sensible in a context that has no precise analogue applicable to those who are already citizens.

759-760, 762. Although it acknowledged (*id.* at 764-765) that the citizen plaintiffs' First Amendment rights were implicated, the Court found those rights insufficient to prevail against the "plenary congressional power to make policies and rules for [the] exclusion of aliens." *Id.* at 769. Where that power had been delegated by statute to the Attorney General, and exercised "on the basis of a facially legitimate and bona fide reason," the Court explained that it would "neither look behind the exercise of that discretion, nor test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant."[7] *Id.* at 770.

The Court reaffirmed its application of the deferential "facially legitimate and bona fide" standard of review in *Fiallo* v. *Bell*, *supra*. The plaintiffs in that case asserted rights on behalf of U.S. citizens and resident aliens to equal treatment for fathers and their illegitimate children in the award of certain special immigration privileges. See 430 U.S. at 788-790. In arguing that the Court's precedents recognizing Congress's sweeping powers in such areas (see *id.* at 792-793) should not control the case, the plaintiffs specifically pointed out that they asserted the rights not of aliens seeking entry but of citizens and permanent residents. *Id.* at 794. The Court responded, however, that it could "see no reason to

[7] *Mandel* recognized and deferred to the executive *implementation* of Congress's legislative decision to exclude certain aliens, subject to waivers available in the discretion of the Attorney General. See 408 U.S. at 767-770. That ruling disposes of petitioner's argument (Pet. 17-18) that he challenges only the Attorney General's "*method* of accomplishing the substantive task" delegated to her by Congress, and that her decisions in that regard are not entitled to the deference accorded the underlying legislative choices they are designed to effectuate.

review the broad congressional policy choice at issue * * * under a more exacting standard than was applied in *Kleindienst* v. *Mandel*, a First Amendment case." *Id.* at 795. See also *Wauchope* v. *United States Dep't of State*, 985 F.2d 1407, 1412-1414 (9th Cir. 1993) (applying *Mandel* standard to claim that statute violated rights of citizen mothers by allowing only citizen fathers to transmit citizenship to foreign-born children).

Although both *Mandel* and *Fiallo* involved rules excluding particular aliens from initial entry into the country, there is no reason to apply a different standard to legislative and executive decisions made in the context of evaluating an admitted alien's final application for naturalization. The Constitution explicitly grants Congress authority over "Naturalization" (U.S. Const. Art. I, § 8, Cl. 4), whereas the power to regulate immigration is implied as part of that and other of Congress's enumerated and inherent sovereign powers (see, *e.g.*, *Fiallo*, 430 U.S. at 792); and this Court has recognized the breadth and exclusivity of Congress's power in the naturalization as well as in the immigration context. See, *e.g.*, *INS* v. *Pangilinan*, 486 U.S. 875, 882-885 (1988) (courts have no power to confer citizenship other than in accordance with statutory authority); *Fedorenko* v. *United States*, 449 U.S. 490, 506-507 (1981) ("Congress alone has the constitutional authority to prescribe rules for naturalization"); *Berenyi* v. *District Director*, 385 U.S. at 636-637 (government has a "strong and legitimate interest in ensuring that only qualified persons are granted citizenship"). For purposes of defining standards of review, there is no logical distinction between Congress's power to regulate who may enter the country as an alien (see, *e.g.*, *Kleindienst* v. *Mandel*, *supra*) and its power to set the terms, conditions and procedures for naturalization for persons who are otherwise aliens—

whether at birth outside the United States (see *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702-703 (1898)) or after a long period of residence therein. And even if there were such a distinction, "admission of an alien to citizenship is," as the court of appeals observed (Pet. App. B14 n.7), "at least as fundamental to the identity of the nation as the initial decision of whom to admit." The court of appeals was therefore correct to accord decisions concerning the former "at least as much judicial deference" as those concerning the latter. Pet. App. B13.

Applying the appropriate standard, both courts below held that the Attorney General had a facially legitimate and bona fide reason for requiring a response to Question 18, because a list of an applicant's present and past associations is material to allowing responsible INS officials to determine for themselves whether the applicant meets all of the criteria for naturalization that Congress has set forth. Pet. App. B13-B16, D19. For the reasons outlined above (see pages 11-13, *supra*), that decision is correct, and requires no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1993